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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-125

ALAMO LAND AND CATTLE CO., INC.,

Petitioner

vs.

THE STATE OF ARIZONA,

Respondent

BRIEF FOR THE WHITE SANDS RANCHERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF THE ASSOCIATION

The White Sands Ranchers Association is an informal association of ranchers whose ranch properties are embraced within the White Sands Missile Range in New Mexico. The association was formed to achieve unity in defense of pending condemnation suits filed by the United States for use of such ranches for a term of years ending June 30, 1980. The ranchers in this association have grazing leases on a substantial portion of the 286,000 acres of State of New Mexico lands within the confines of the White Sands Missile Range. Accordingly, this

association has a vital interest in seeking review of the lower court's decision, which if left undisturbed would result in a precedent denying a state grazing lessee just compensation for a compensable property right in derogation of the protection afforded under the Fifth Amendment.

STATEMENT OF THE CASE

The United States brought this action by way of condemnation. The property involved consists of two tracts of land designated in the record as tracts 304 and 305, which tracts are owned by the State of Arizona, having been acquired as part of the grant by the United States under the New Mexico-Arizona Enabling Act (Act of June 20, 1910, 36 Stat. 557, as amended June 2, 1951, 65 Stat. 50). The lands were granted for the support of public schools and are subject to the restrictions set forth in Sec. 28 of the Act. At the time the condemnation suit was filed, the lands involved had been leased by the State of Arizona (Arizona) to the Petitioner, Alamo Land and Cattle Co., Inc. (Alamo), under a ten-year grazing lease.

Subsequent to the filing of the condemnation, Arizona and Alamo stipulated with the United States that full just compensation for the property and improvements thereon was the sum of $118,620.00. Following a distribution hearing, the District Court awarded Alamo the sum of $3,600.00 for its improvements and $57,050.00 for its present leasehold interest and awarded Arizona the balance of the award.

On appeal by Arizona to the Ninth Circuit, the judgment awarding compensation to Alamo for its present leasehold interest was reversed and all the compensation, excepting that relating to improvements, was ordered paid to Arizona.

REASONS FOR GRANTING THE WRIT

The decision below raises issues of great and far-reaching importance. In this brief, we show that the lower court's holding with respect to the right of a state grazing lessee to be compensated for the value of his present leasehold interest is in direct conflict with the decision of the Eighth Circuit in **Nebraska v. United States,** 164 F.2d 866 (8th Cir. 1947); furthermore, the decision decides an important state question in a way to conflict with applicable state law. In addition, we will show that the lower court's holding involves an important question of federal law which has not been, but should be, settled by this Court. For these reasons, we believe that if the decision of the Ninth Circuit is left undisturbed, it will result in the perpetration of the claimed error causing owners of state grazing leases to be subjected to loss of their property without just compensation in violation of the protection afforded under the Fifth Amendment.

A. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE EIGHTH CIRCUIT.

The Ninth Circuit's decision on the question at issue squarely conflicts with the decision of the Eighth Circuit in **Nebraska v. United States, supra.**

In **Nebraska**, the Eighth Circuit was concerned with a condemnation suit instituted by the United States to acquire some 19,500 acres of land in Nebraska which included two sections of land which had been granted to the State of Nebraska under its Enabling Act for the support of common schools, 13 Stat. 47, 49, Sec. 7. At the time of condemnation, these lands had been leased by the State to private persons for agricultural use for unexpired terms of years. The trial court jury found that a portion of the award was due the lessee and entered judgment accordingly. On appeal to the Eighth Circuit, the State of Nebraska maintained a contention identical to Respondent herein:

> "(T)he State contends that the United States should have been required to pay it as just compensation an amount equal to the full value of the fee without any deduction for the outstanding leaseholds" 164 F.2d at 867.

The Eighth Circuit, in rejecting the contention of the State of Nebraska, affirmed the lower court's award and in so holding stated:

> "What constitutes property and what is just compensation for it in a condemnation by the United States are not questions of state law but of federal law. **United States v. Miller**, 317 U.S. 369, 379, 380, 63 S.Ct. 276, 283, 87 L.Ed. 336, 147 A.L.R. 55. Of course, the term 'property' in such a situation normally will be given the same content as in state law. **United States v. Powelson**, 319 U.S. 266, 279, 63 S.Ct. 1047, 1054, 87 L.Ed. 1390; and also cf. **United States v. Petty Motor Co.**, 327 U.S. 372, 380, 381, 66 S.Ct. 596, 601, 90 L.Ed. 729." 164 F.2d at 867, 868.

Elaborating further on the fact that a lessee had a compensable property right, the Eighth Circuit stated:

> "In state concept as well as under general law, the rights of the State and the rights of lessees in the school lands each constituted a property interest, and in this concurrence of concepts there manifestly would be no occasion to regard either of them otherwise in federal law for purposes of compensation in condemnation. But, as we have suggested, the question of what is just compensation under the Fifth Amendment for such rights does not turn in any manner upon the compensation standards or prescriptions of state law. If it did, the State of Nebraska in the present situation would have had as much right to argue that the United States should be bound by some artificial provision in its Constitution (e.g. that in any condemnation of its school lands the State should be paid a value of $1,000.00 per acre) as by the rule of compensation which it has judicially adopted for such lands in the **Platte Valley Public Power & Irrigation District** case." 164 F.2d at 868.

Finally, the Eighth Circuit, addressing itself to the contention of the State of Nebraska that to

sanction the compensation award to the lessee would result in a breach of trust under the Enabling Act, said:

> "In relation to the sovereign rights and constitutional obligation of the United States, the school lands therefore could not be said to be in any different position as to value and just compensation than the other lands in the community.
>
> The compensation obligation of the United States was not increased by the fact that the State held the lands for the benefit of its common school system. The United States in originally granting the lands to the State had not guaranteed that the State would realize any amount out of them for the benefit of its schools. It did not agree that, should condemnation of such lands subsequently become necessary for its sovereign purposes, it would pay more than the fair market value of the land in compensation. It did not assume to save the State harmless in such a situation from a diminution in the market value of the State's rights through the creation of a leasehold, easement, or other interest in the land by the State's own acts.
>
> As a matter of fact, except only as the State has undertaken to condition the exercise of its grant of the power of eminent domain over school lands, it has expressly recognized that it cannot expect to escape the pecuniary consequences of creating leaseholds in such lands." 164 F.2d at 869.

The Ninth Circuit in the case at bar, while recognizing the pronouncements in **Nebraska**, determined that the case at bar was distinguishable because the Nebraska Enabling Act did not contain the same restrictions which are incorporated in Section 28 of the New Mexico-Arizona Enabling Act as construed and interpreted by this Court in **Lassen v. Arizona**, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515. **Lassen** is clearly not authority for the proposition that the Arizona Enabling Act precludes a lessee of school lands from receiving just compensation for a leasehold estate taken by way of condemnation. **Lassen** did not involve a federal condemnation and can only be said to stand for the proposition that the Arizona Highway Department must pay just and reasonable compensation to the State Land Commissioner when condemning school trust fund lands. 87 S.Ct. at 586. Although the opinion in question refers to a difference in the wording between the Enabling Acts of Arizona and Nebraska, it fails to recognize that portion of Nebraska's Enabling Act which refers to school trust lands (2 N.R.S. 1943, p.7) was construed exactly the same in **Nebraska v. United States, supra,** as Arizona's was construed in **Lassen.** The court below in construing **Lassen** to require that all consideration be paid to the State cited with approval the following statement of this Court:

> "(T)he Enabling Act unequivocally demands both that the trust receive the full value of any lands transferred from it and that any funds received be employed only for the purposes for which the land was given." 385 U.S. at 467.

The lower court in relying on the above quotation construed the statement to mean that even in situations where the fee is encumbered by a permitted lease that the State must nevertheless receive the full value of the fee interest. Such a construction was obviously not intended by this Court in this instance because the condemnation of the separate estates did not effect a "transfer". The only "transfer" of the land occurred when the State created the leasehold estate as expressly authorized by the Enabling Act, and no question is involved concerning whether the State received full value for the lease at the time of the leasehold transaction. As the trial court held, when the condemnation was filed, there were two separate and distinct estates in land and each was entitled to compensation for the estate taken. The only requirement of both Enabling Acts is that the State receive full value for the "property interest" owned by the State at the time of condemnation. To construe the Enabling Act restrictions otherwise is contrary to the plain and unequivocable dictate of the Fifth Amendment securing only the right to just compensation for the property interest actually taken. This principle is even more clear under the Arizona Enabling Act than the Nebraska Enabling Act because the Arizona Act expressly permits the Commissioner of Public Lands to execute grazing and agricultural leases for a term of ten years or less (Sec. 28). (This is equally true under the New Mexico Enabling Act.) The principle of federal condemnation law requiring allocation of the total value between the separate interests or estates in the land is not unique and has been repeatedly sanctioned by the

courts. **Nebraska v. United States, supra, Boston Chamber of Commerce v. City of Boston,** 217 U.S. 189, 30 S.Ct. 459, 54 L.Ed. 725, and **United States v. Certain Parcels of Land in City of Baltimore,** (D.C. Md.) 43 F.Supp. 687, 689.

B. THE DECISION BELOW DECIDES AN IMPORTANT STATE QUESTION IN CONFLICT WITH APPLICABLE STATE LAW.

Not only have the federal courts abided the rule requiring compensation to separate estates and interests upon condemnation, the courts of Arizona and New Mexico have likewise adopted such rule.

Thus, in **State ex rel. State Highway Commission v. Chavez,** 80 N.M. 394, 456 P.2d 868 (1969), the New Mexico Supreme Court in upholding the right of a state lessee to receive compensation for the leasehold estate taken by the New Mexico State Highway Department in condemnation, stated:

> "From the testimony of appellant's appraiser, quoted above, it is clear that the lease, even though it had less than six months to run, and did not have a legally binding option to renew, was in his opinion a valuable asset worth $22,500.00 before the taking, which was reduced to $6,000.00 after taking, or a net damage to the lessee of $16,500.00. We see nothing in our earlier holding that denied the right to have all the elements of damage resulting from the condemnation con-

sidered when arriving at the award. Indeed, such a holding would be of questionable constitutionality as permitting the taking or damaging of property without the payment of just compensation." 456 P.2d at 873.

Likewise, the Arizona Supreme Court in **State v. Carrow**, 57 Ariz. 429, 114 P.2d 891 (1941) has recognized that a lessee is entitled to a condemnation award based upon its interest in the property:

> "It is necessary, therefore, that the judgment be reversed and the case remanded for a new trial upon the issue of damages for erosion, diversion of drainage, and loss of use as a cattle range, with instructions to apportion the damages for these elements between the owners of the fee and of the leasehold of the land damaged as their respective interests may appear." 114 P.2d at 893.

C. THE DECISION BELOW INVOLVES AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The importance of this litigation insofar as it concerns the right of a state grazing lessee to recover compensation when such estate is subject to condemnation cannot be overstated. In the state of New Mexico alone there are in excess of 9,000,000 acres of school lands subject to grazing leases. (Annual Report of Commissioner of Public Lands, State of New

Mexico, 61st Fiscal Year, July 1, 1972 through June 30, 1973). The import of the Decision is not limited solely to the right of a grazing lessee to receive compensation, but rather the statement of the lower court that "Alamo therefore never acquired a property right for which it is entitled to compensation" has far reaching economic implications which we understand will be commented on at length in other amicus briefs in support of the Petition. Furthermore, state grazing leases are involved in practically all ranches of any consequence in both the states of Arizona and New Mexico due to the manner in which lands were granted to the states under the Enabling Acts. It is a matter of common knowledge that in appraising these ranches for sale, condemnation and estate tax purposes, the state leases have since statehood been generally considered and recognized by both the states and the owners of these ranch properties as valuable "property rights". In this connection, the decision of the lower court fails to point out and to consider the fact that the Arizona Enabling Act, which is also the case of the New Mexico Enabling Act, makes specific provision for the leasing of state lands for agricultural purposes. Certainly when the states undertook to exercise the privileges given to them of leasing the lands for agricultural purposes and to receive from the lessees compensation therefor, the state lands should be considered as burdened with the rights granted to the respective lessees under the leases, which are certainly a property right as much as any other lease regardless of the character of the land which it may cover.

Finally, the decision of the lower court casts a serious cloud over the validity of collateral assignments of such leases as security for loans, a procedure sanctioned by the Land Commissioners in both Arizona and New Mexico (see, for example, Section 7-8-39, N.M.S.A., 1953 Compilation). If it can be said that such collateral is not supported by a property right, then obviously the collateral is of little or no value to lending institutions who daily secure loans by such means. In addition, other agencies of the federal government have historically considered such leaseholds property interests. For example, the Bureau of Internal Revenue, Estate Tax Division, routinely imposes tax on estates where such state leaseholds are involved.

It is only by this Court accepting jurisdiction and overturning the lower court that the disasterous consequences of the decision below can be rectified. Anything short of this request would mean that the guarantee of the Fifth Amendment requiring compensation to all property interests and estates would be abrogated. **United States v. Dunnington**, 146 U.S. 338, 351, 352, 353, 13 S.Ct. 79, 36 L.Ed. 996; **Meadows v. United States**, (4th Cir.) 144 F.2d 751, 753; and **United States v. Sunset Cemetery Co.**, (7th Cir.) 132 F.2d 163, 165.

CONCLUSION

The decision of the court below conflicts with the decision of the Eighth Circuit in **Nebraska v. United States, supra,** and contravenes

established federal and state condemnation law and procedures. It is essential that this conflict be resolved to insure persons in the status of grazing lessees on state school trust lands have their property interest protected as is required by the Fifth Amendment. The issue involved is one of substantial legal and practical importance and should be decided by this Court.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within Brief Amicus Curiae to counsel for Petitioner and Respondent.

_____

DATED: August 8, 1974

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No._____

ALAMO LAND & CATTLE CO., INC., Petitioner.

-vs-

STATE OF ARIZONA, Respondent.

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the above Amicus Curiae Brief of the White Sands Ranchers Association may be filed in this proceeding with the Supreme Court of the United States.

DATED this 2nd day of August, 1974.

S/J. GORDON COOK, for and on behalf of ALAMO LAND & CATTLE CO., INC., Petitioner

S/PETER C. GULATTO, Assistant Attorney General for and on behalf of The State of Arizona, Respondent